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 DEPARTMENT OF STATE

THE LEGAL ADVISER

March 11, 1959

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TO : The Acting Secretary

FROM : L - Mr. Becker

SUBJECT: Legal situation if the Soviets blockade the Berlin civilian population

In connection with the contingency planning regarding Berlin, we have reviewed the legal situation which would result if the German traffic to and from Berlin were to be cut off by action of the Soviet Union or by the East German regime acting, as it would be, pursuant to Soviet orders.

At the present time German traffic to and from Berlin of both goods and persons is in fact, if not admittedly, subject to East German controls in such forms as the imposition of fees and tolls and the inspection of goods, documents, and personal identification. It is thus possible for East German officials to apply varying degrees of pressure upon Berlin traffic. There have been, for example, minor harassments from time to time such as conducting truck inspections on the Autobahn at such a slow pace as to make the Berlin haul an uneconomic operation. There have been harassments of moderate severity such as the imposition of road and canal taxes at such exorbitant levels as to require subventions to the operations from the German Federal Government in order to ensure keeping the traffic moving. In the background there always looms the East German ability to cut, either declaredly or on spurious technical grounds, access to Berlin by rail, road, and canal.

The chief existing deterrent to such action on the German side arises from the existing interzonal trade arrangements. In 1951 an agreement specifying the extent and manner of conducting trade between East and West Germany was signed at Berlin by the Treuhandstelle, a semi-official agency set up by the German Federal Government to deal with the East Germans on interzonal trade matters. In connection with the signing of the agreement, the Treuhandstelle made an oral statement that free traffic to and from Berlin was a sine qua non for the implementation of the agreement. The 1951 agreement has been continued in effect to the present through the negotiation of protocols thereto. In 1958, in connection with an East German proposal for iron and steel deliveries to East Germany, the Treuhandstelle made acceptance of the proposal subject to certain technical requirements and "other conditions". This latter phrase, according to the German authorities, includes the maintenance of free traffic access to and from Berlin.

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As the Soviet Zone needs for interzonal trade are substantially greater than those of the Federal Republic, the insistence upon free traffic access as a precondition to continuing such access is thus of considerable value. If, however, a blockade of the Berlin population is put into effect by the Soviets, it will necessarily be done on the expectation that interzonal trade will be terminated. In such case, the recourse will then be to supply the Western Sectors of Berlin on the basis of Allied rights of access, particularly as confirmed by the New York and Paris Agreements of 1949, and on the provisions regarding interzonal trade contained therein.

There is no specific provision contained in the Agreement on Zones of Occupation and Administration of the Greater Berlin Area (TIAS 3071) or in the Agreement on Allied Control Machinery in Germany (TIAS 3070) regarding the supplying of the requirements of the population of Berlin. (There is likewise, of course, no provision regarding access of the Western Allies to the city.) The subsidiary arrangements worked out with respect to the exercise of the rights of access, however, clearly establish that the Soviets recognized and agreed to the right of the Western Allies to supply the population of the Western Sectors of Berlin. The Control Council decision of September 10, 1945 (CONL/M(45)5) constituted, subject to certain minor amendments, approval of a report regarding the delivery of coal and food supplies to Berlin. This report, enclosure 1 to COML/P(45)27, made specific reference to "the rail traffic volume necessary to support the Allied and British needs". It included eight trains per day for "Coal (U.S., British, and French -- Civil and Military combined)" and five trains for "Civil Food (British, French and U.S. total commitments.)" It is then clear that from the first days of the occupation there was Soviet recognition of the rights of the Western Allies to supply the civil population of the Western Sectors of Berlin.

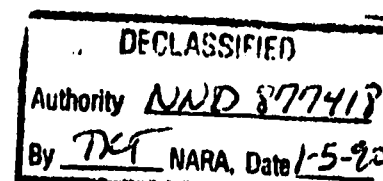
No similar specific provisions are to be found in the arrangements made with respect to road or canal access, although it is understood that, in fact, civilian supplies were brought in by both these additional routes prior to the Berlin blockade.

In its note of July 6, 1948, to the U.S.S.R. regarding the imposition of the Berlin blockade, the United States pointed out that the supplying of the inhabitants of Western Berlin had in fact been undertaken at Russian request:

"This Government now shares with the Governments of France and The United Kingdom the responsibility initially undertaken at Soviet request on July 7, 1945, for the physical well-being of 2,400,000 persons in the western sectors of Berlin. Restrictions recently imposed by the Soviet authorities in Berlin have operated to prevent this Government and the Governments of the United Kingdom and of France from fulfilling that responsibility in an adequate manner.

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"The responsibility which this Government bears for the physical well-being and the safety of the German population in its sector of Berlin is outstandingly humanitarian in character. This population includes hundreds of thousands of women and children, whose health and safety are dependent on the continued use of adequate facilities for moving food, medical supplies and other items of indispensable to the maintenance of human life in the western sectors of Berlin. The most elemental of these human rights which both our Governments are solemnly pledged to protect are thus placed in jeopardy by these restrictions. It is intolerable that any one of the occupying authorities should attempt to impose a blockade upon the peoples of Berlin.

"The United States Government is therefore obliged to insist that in accordance with existing agreements the arrangements for the movement of freight and passenger traffic between the western zones and Berlin be fully restored. There can be no question of delay in the restoration of these essential services, since the needs of the civilian population in the Berlin area are imperative."

The foregoing position was reiterated in a note to the U.S.S.R. of September 26, 1948.

"...These measures (the halting of traffic) persistently pursued, amounted to a blockade of land and water transport and communication between the Western zones of Germany and Berlin which not only endangered the maintenance of the forces of occupation of the United States, France and the United Kingdom in that city but also jeopardized the discharge by those Governments of their duties as occupying powers through the threat of starvation, disease and economic ruin for the population of Berlin."

The New York Agreement of May 4, 1949, which terminated the Berlin blockade, provides, in pertinent part:

"1. All the restrictions imposed since March 1, 1948 by the Government of the Union of Soviet Socialist Republics on communications, transportation, and trade between Berlin and the Western zones of Germany and between the Eastern zone and the Western zones will be removed on May 12, 1949."

The Four Power communique issued in Paris on June 20, 1949 by the Sixth Session of the Council of Foreign Ministers, provided in pertinent part:

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"Despite the inability at this session of the Council of Foreign Ministers to reach agreement on the restoration of the economic and political unity of Germany the Foreign Ministers of France, the Union of Soviet Socialist Republics, the United Kingdom and the United States will continue their efforts to achieve this result and in particular now agree as follows:

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"2. The occupation authorities, in the light of the intention of the Ministers to continue their efforts to achieve the restoration of the economic and political unity of Germany, shall consult together in Berlin on a quadripartite basis.

"3. These consultations will have as their purpose, among others, to mitigate the effects of the present administrative division of Germany and of Berlin notably in the matters listed below:

(A) Expansion of trade and development of the financial and economic relations between the western zones and the eastern zone and between Berlin and the zones.

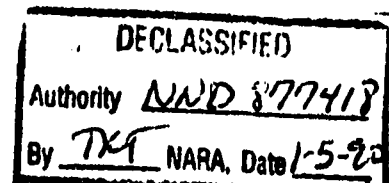
(B) Facilitation of the movement of persons and goods and the exchange of information between the western zones and the eastern zone and between Berlin and the zones.

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"5. The Governments of France, the Union of Soviet Socialist Republics, the United Kingdom, and the United States agree that the New York Agreement of May 4, 1949 shall be maintained. Moreover, in order to promote further the aims set forth in the preceding paragraphs and in order to improve and supplement this and other arrangements and agreements as regards the movement of persons and goods and communications between the eastern zone and the western zones and between the zones and Berlin and also in regard to transit, the occupation authorities, each in his own zone, will have an obligation to take the measures necessary to ensure the normal functioning and utilization of rail, water, and road transport for such movement of persons and goods and such communications by post, telephone and telegraph."

The New York and Paris Agreements thus not only confirm our rights of access and our rights to supply the civilian population of the Western Sectors of Berlin, they also confirm the rights of the German population in Western Berlin and in the Western Zones (FRG) to enjoy normal trade, traffic and communications as between themselves and impose an obligation upon the USSR to prevent any interference therewith.

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The Soviet Union has already repudiated these obligations regarding German traffic on two occasions. On March 30, 1955 the East German authorities imposed drastic increases in the road tolls charged truck traffic between Berlin and West Germany on the grounds of covering maintenance costs although the increases were far in excess of such costs. Protests by the Bonn Embassies of the Western Powers on the basis of the Paris Agreement were answered by Russian Ambassador Pushkin to the effect that the matter was within the competence of the East German regime. In 1958, similar protests were made in connection with the imposition of exorbitant tolls on the use of the East German canals by West German vessels. Again protests had no effect. The traffic has been kept moving in both instances through subsidies paid by the Federal Government. Further violations of the agreements can be anticipated whenever the Soviets find such action desirable.

Reliance upon the rights provided for civilian traffic under the New York and Paris Agreements in the event of Soviet or East German moves to drastically curtail or cut off such traffic would, although legally sound, be practically fruitless as there is no sure method of enforcing the exercise of such rights. In the event of such action, therefore, the appropriate course would be for the Western Allies to resume meeting the needs of the civil population of the Western Sectors of Berlin on the basis of their established legal rights to do so. The manner of carrying out such a supply operation is one which should be considered in connection with the current contingency planning for Berlin.

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